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No.

In the Supreme Court of the United States

OCTOBER TERM, 1984

HOME PLACEMENT SERVICE, INC.,
PETITIONER,

v.

PROVIDENCE JOURNAL COMPANY,
RESPONDENT.

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

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Questions Presented

1. Whether a Court of Appeals can, by remand order, mandate that a district Judge make findings of fact and conclusions of law on a record not heard by said district judge contrary to the provisions of Rules 63 F.R.C.P. and 52 F.R.C.P.?

2. Whether, in a non-jury case, Rule 63 F.R.C.P. requires that a new trial be granted when the original judge who heard the witnesses and ruled on the admission and exclusion of evidence becomes disabled before findings of fact and conclusions of law are made by said original judge on the issues in question?

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No.

In the Supreme Court of the United States

OCTOBER TERM, 1984

HOME PLACEMENT SERVICE, INC.,
PETITIONER,

v.

PROVIDENCE JOURNAL COMPANY,
RESPONDENT.

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

The Petitioner, Home Placement Service, Inc., respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on July 11, 1984.

Opinions Below

The opinion of the Court of Appeals (reprinted in the Appendix at A. 1) is reported at 739 F.2d 671 (1st Cir. 1984). In addition the Appendix includes the Order of the Court of Appeals denying Petitioners request for rehearing. (Reprinted in Appendix at A. 23).

Jurisdiction

The Judgment of the Court of Appeals for the First Circuit was entered on July 11, 1984. A Petition for Rehearing was denied on August 28, 1984. This Petition was filed within 90 days of entry of the Order denying Rehearing. 28 USC § 2101 (c). Rule 20.4 S.Ct. Rules.

This Court's jurisdiction is invoked under 28 USC § 1254 (1).

Constitutional and Statutory Provisions Involved. United States Code, Title 15:

> Section 1. Trust, etc., in restraint of trade illegal; penalty. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.
>
> Section 2. Monopolizing trade a felony; penalty. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments in the discretion of the court.

Fed. Rules Civ. Proc. 52(a):

> In all actions tried upon the fact without a jury . . . (f)indings of fact shall not be set aside unless clearly er-

> roneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

Fed. Rules Civ. Proc. 63:

> If by reason of death, sickness, or other disability, a judge before whom an action has been tried is unable to perform the duties to be performed by the Court under these rules after a verdict is returned or findings of fact and conclusions of law are filed, then any other judge regularly sitting in or assigned to the court in which the action was tried may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial.

Statement of the Case

This is an antitrust case brought pursuant to 15 USC §§ 1 and 2 by Plaintiff, Home Placement Service, Inc. a now defunct rental referral corporation that was driven out of business by the antitrust violations of the defendant Providence Journal Company. The matter was tried in the district court for the District of Rhode Island by the Court sitting without a jury. The evidence in the initial trial consisted of the introduction of the entire record (by stipulation) of an earlier case which involved identical issues, *see, Homefinders of America, Inc. v. Providence Journal Co.*, 621 F.2d 441 (1st Cir. 1980) (Homefinders), and additional supplementary evidence taken in this trial. The Homefinders case and this case were heard by the same district judge (Honorable Francis J. Boyle) sitting without a jury and thus the district judge in the Home Placement case was being asked to make findings of fact and conclusions of law on a single consolidated record heard by said judge.

At the initial Home Placement trial, the district judge ruled against plaintiff on the liability issue and consequently did

not reach the damage or injunctive relief questions. *Home Placement Service, Inc. v. Providence Journal Co.*, (unpublished). The Court of Appeals for the First Circuit reversed ruling the plaintiff was entitled to judgment on the antitrust claims a[illegible] remanding for "further proceedings" to determine the questions of injunctive relief, damages and attorneys fees. *See, Home Placement Service, Inc. v. Providence Journal Co.*, 682 F.2d 274 (1st Cir. 1982). This Court denied defendant's petition for a Writ of Certiorari. *Providence Journal Co. v. Home Placement Service, Inc.*, 103 S.Ct. 1279 (1983).

The Court of Appeals remand Order required that the matter be assigned to a different district judge for purposes of determining the questions of injunctive relief, damages and attorneys fees. *Home Placement, supra* at 281. On remand, plaintiff sought a new trial on the questions presented arguing that a district judge who had not heard the evidence could not make findings of fact and conclusions of law on said record. The district court denied plaintiff's request for a new trial. Plaintiff then sought a clarification of the appellate mandate from the Court of Appeals. The First Circuit granted plaintiff's motion for clarification, but declined to order a new trial.

The district court thereafter proceeded to decide the questions of injunctive relief, damages and attorneys fees on the constituted record not heard by said judge. The district court granted injunctive relief, awarded only nominal damages in the sum of One Dollar ($1.00) trebled and awarded attorneys fees.

Plaintiff thereafter appealed the damage and attorneys fees issues to the First Circuit Court of Appeals.[1] On appeal plaintiff raised several issues including *inter alia* whether the district judge should have recused himself and whether plaintiff should have been entitled to a new trial in light of

[1] Defendants cross-appealed on the attorneys fees issue.

the provisions of Rule 63 F.R.C.P. The Court of Appeals again reversed the matter and remanded ruling that the district judge should have recused himself and ordered a new hearing before a different district judge. *See, Home Placement Service, Inc. v. Providence Journal Co.*, 739 F.2d 671 (1st Cir. 1984). The Court of Appeals, however, refused to grant a complete new trial on the damage issue ruling instead that Rule 63 F.R.C.P. was not applicable, and that if Rule 63 F.R.C.P. was applicable it was purely discretionary. *Id.* at 677-678. The Court of Appeals, however, left the district court no discretion on remand ruling instead that the district court would be confined solely to the record as it was then constituted. *Id.* at 679.

On Petition for Rehearing Plaintiff argued that the Court of Appeals rulings on the Rule 63 F.R.C.P. in use were wrong, and were nevertheless contrary to the unanimous rulings of Courts, both Federal and State, that had considered the issue (A. 18). On August 28, 1984 the Court of Appeals denied Plaintiff's petition for rehearing, slightly modified its remand order, but refused to order a new trial (A. 23).

As it presently stands, the Court of Appeals decision now remands this matter to a district judge twice removed from the original judge who heard the witnesses and ruled on the admission and exclusion of evidence, and requires this twice removed district judge to make findings of fact and conclusions of law on a record not heard by said judge. Moreover, under the Court of Appeals remand order the district judge is left with no discretion to grant a new trial even if in the district judge's wisdom a new trial would be preferable because of the judge's lack of familiarity with the record.

Reasons for Granting the Writ

I. THE RULING OF THE FIRST CIRCUIT ON THE RULE 63 F.R.C.P. ISSUE IS CONTRARY TO THE UNANIMOUS HOLDINGS OF THE OTHER FEDERAL APPELLATE COURTS THAT HAVE CONSIDERED THE ISSUE AND THUS CREATES A CONFLICT IN THE CIRCUITS ON THIS ISSUE.

Rule 63 F.R.C.P. provides:

> If by reason of death, sickness, or other disability, a judge before whom an action has been tried is unable to perform the duties to be performed by the Court under these rules after a verdict is returned or findings of fact and conclusions of law are filed, then any other judge regularly sitting in or assigned to the court in which the action was tried may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial.

In the almost fifty years since the Rules of Civil Procedure have been adopted this Court has not had occasion to interpret said rule. Prior to the First Circuit's ruling in this case the Circuit Courts that had interpreted Rule 63 F.R.C.P. had unanimously held that Rule 63 *required* a new trial in non-jury cases if the original judge who heard the witnesses became disabled *before findings of fact and conclusions of law had been filed by said judge. See, Whalen v. Ford Credit Co.*, 684 F.2d 272 (4th Cir. 1982); (and cases cited), *cert. denied* 103 S.Ct. 216. *Thompson v. Sawyer*, 678 F.2d 257, 268-269 (D.C. Cir. 1982); *Arrow Hart, Inc. v. Covert Hills, Inc.*, 552 F.2d 711 (6th Cir. 1977); *Federal Deposit Inc. Corp. v. Sirocco*, 174 F.2d 360 (2nd Cir. 1949); *Sea-Gate, Inc. v. United States*, 35 Fed. Rules Serv. 2d 1392 (Ct. Cl. 1983). The rationale for these rulings is best set out in the reasoning of the *en banc* decision of the Fourth Circuit Court on this issue.

> The supposition is unrealistic that the distinguished group of legal scholars who, as the Advisory Committee

> on the Civil Rules, prepared the Rules for approval and adoption by the United States Supreme Court meant, by their silence, to permit the possibility of substitution of a judge before verdict when Rule 63 entitled "Disability of a Judge" expressly deals only with substitution of a Judge after return of verdict. Inherent in the ascription of such a sub silentio purpose would necessarily be establishment that there had been prior practice in which substitution of a judge after trial began but before return of verdict customarily had been allowed over the objection of one of the parties.
>
> But the experience had all been the other way. Research has failed to turn up a single case of substitution before verdict where one of the parties refused to consent. *Cf. Substitution of Judge in Criminal Case,* 83 A.L.R. 2d 1032, 1034, 1036 (1962) ("A substitution of judges during the introduction of evidence, over the objection of the accused has been held to be error."); *Coleshill v. Manchester Corp.,* (1928) 1 K.B. 785 (Scrutton, J.: "I doubt whether a judge has any jurisdiction to continue the hearing of a case in which witnesses have been called in court in the course of the trial before the jury and another judge . . .").

Whalen v. Ford Motor Credit Co., supra at 275-275 (Footnote omitted).[2]

The First Circuit's ruling on the Rule 63 issue is contrary to the above unanimous holdings by other federal appellate courts.[3] The First Circuit has, in effect, mandated that the

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[2] State courts that have interpreted Rule 63 have uniformly agreed that a new trial is mandatory when a successor judge is substituted before findings of fact and conclusions of law have been filed by the judge who heard the evidence. *See, e.g., Pallestine v. Severance,* 375 F.2d 528, 529-530 (Alaska 1966); *Sunshine v. Sunshine,* 30 Colo. App. 67, 72, 488 F.2d 1131,1134 (1971); *Girard Trust Bank v. Easton,* 12 N.C. App. 153,155, 182 S.E.2d 645, 646 (1971); *State ex rel Lunsford v. Weber,* 153 W.Va. 544, 547-548, 170 S.E. 2d 671, 673 (1969).

[3] The First Circuit's ruling below which also held that Rule 63 F.R.C.P. was not "applicable" because of a stipulation entered into between the parties, *see, Home Placement, supra* at 677-678 (A. 24) is erroneous. The only reason the Court of Appeals gave for

district court violate the provisions of Rule 63 F.R.C.P.[4] The rule would be violated here because the original judge who heard the witnesses became "disabled" by the previous ruling of the First Circuit. The appellate mandate required that the matter be assigned to a different district judge. Since the original judge who heard the witnesses had made no findings of fact or conclusions of law on the remand issues a new trial should have been required under Rule 63 F.R.C.P.

The First Circuit has now reversed and remanded again this time to a district judge twice removed from the original trial and has required that this district judge make findings of fact and conclusions of law on a record not heard by said judge. This ruling and remand by the First Circuit does violence not only to the provisions of Rule 63 F.R.C.P. but to the integrity of the judicial process and the policies and purposes of Rule 52 F.R.C.P. Rule 52 F.R.C.P. presumes that findings of fact and conclusions of law will be made by district

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saying that Rule 63 was not "applicable" was the fact that the parties had stipulated that the earlier Homefinders record would become part of the record in this case. 739 F.2d 672 at n.1, 677-678. See A. 24. But this stipulation cannot be a basis for disregarding the principles underlying the wisdom of Rule 63 that a judge who makes factual findings should be the judge who hears the witnesses. The stipulation of the parties merely allowed the *original* district judge who had presided at both trials to consider evidence introduced at the earlier trial. Moreover, the stipulation only permitted the original district judge to make *findings of fact* on a record he had heard. The stipulation was not a stipulation as to what those ultimate findings should be. Thus the Court of Appeals conclusion that the stipulation had a bearing on whether a new district judge could make findings on a record not heard by said judge, contrary to the provisions of Rule 63, is simply erroneous.

[4] Closely intertwined with the Rule 63 issues are questions concerning the policies and purposes of Rule 52 F.R.C.P. Appellate Court deference to findings of fact made by district judges is premised generally upon the fact that the district judge has had an opportunity to hear the witnesses and rule on the admission and exclusion of evidence. *See, Bose Corporation v. Consumers Union of United States, Inc.* U.S. , 52 U.S. Law Week 4513 (April 30, 1984).

judges who have had an opportunity to "judge ... the credibility of the witnesses". Rule 52 F.R.C.P. *See, Bose Corporation v. Consumers Union of the United States, Inc., supra.* Contrary to the express purposes of Rules 52 and 63 the First Circuit's ruling in this case mandates that the district judge make findings of fact and conclusions of law without having an opportunity to "judge the credibility of the witnesses". This Court should grant certiorari to correct the Court of Appeals erroneous rulings in this case and to resolve the conflict in the circuits on the Rule 63 issue.

Conclusion

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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United States Court of Appeals
For the First Circuit

No. 83-1923

HOME PLACEMENT SERVICE, INC., ET AL.,
Plaintiffs, Appellants,

v.

PROVIDENCE JOURNAL COMPANY,
Defendant, Appellee.

No. 84-1096

HOME PLACEMENT SERVICE, INC., ET AL.,
Plaintiffs, Appellees,

v.

PROVIDENCE JOURNAL COMPANY,
Defendant, Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND
[Hon. Bruce M. Selya, *U.S. District Judge*]

Before
Coffin, Bownes and Breyer,
Circuit Judges.

July 11, 1984

Ralph J. Gonnella, with whom *Ralph J. Gonnellla, Ltd.* was on brief, for Home Placement Service, Inc., et al.

Joseph V. Cavanagh, Jr., with whom *Edward F. Hindle, Knight Edwards,* and *Edwards & Angell* were on brief, for Providence Journal Company.

Bownes, *Circuit Judge.* This action was brought pursuant to sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1 and 2. Plaintiffs-appellants, Home Placement Service, Inc., et al. (Home Placement) appeal the district court judgment on three grounds: the judge's refusal to recuse himself; the award of only nominal damages against defendant-appellee, The Providence Journal Company (Providence Journal); and the allegedly erroneous calculation of appellants' attorney's fees.

This case has followed an unusual and rather tortuous procedural path. Home Placement's antitrust suit was based on the allegations that the Providence Journal monopolized the Rhode Island rental advertisement market and by refusing to accept classified rental referral advertisements from Home Placement violated sections 1 and 2 of the Sherman Act. Home Placement sought injunctive relief, damages and attorney's fees.

Prior to the start of trial on December 23, 1980, the parties stipulated that the record, including the evidentiary objections, in a factually similar case, *Homefinders of America, Inc. v. Providence Journal Company,* would be made part of the record in this case.[1]

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1. The stipulation provided:

> The parties in the above-captioned matter hereby agree that the plaintiffs' claim for trial by jury is waived and that the case will proceed for trial before Judge Boyle, sitting without a jury. The parties further agree that the full record in the case of *Homefinders of America, Inc. v. Providence Journal Company*,

Homefinders was tried by the same attorneys before the same district judge (Boyle, J.) who initially heard the instant case. In *Homefinders* the court found no violation of the Sherman Act and dismissed the case. We affirmed, holding that the newspaper, regardless of whether it was a monopoly, had a first amendment right and reasonable business justification for refusing to accept deceptive advertisements. *Homefinders of America, Inc. v. Providence Journal Co.*, 621 F.2d 441, 444 (1980).

After hearing, the court dismissed the action in this case, holding that, "plaintiffs' new evidence is a distinction without a difference ... The respective schemes of Homefinders and Homeplacement [sic] are, for purposes of this proceeding, indistinguishable." On appeal, we reversed holding that the *Home Placement* advertisements, unlike those in *Homefinders*, were not deceptive and that plaintiffs had proven a violation of sections 1 and 2 of the Sherman Act.[2] We remanded "to determine the appropriate form of injunctive relief, if any is needed, and the amount owing in damages and attorney's fees." *Home Placement Service, Inc. v. The Providence Journal Company*, 682 F.2d 274, 281 (1st Cir. 1982), *cert. denied*, 103 S. Ct. 1269 (1983).

Another judge (Selya, J.) handled the case on remand. He ruled that he would determine damages on the basis of the record in *Homefinders* and that there would be no new trial on the question of damages.

Plaintiffs then filed a motion in the court of appeals asking for clarification of our remand order. We responded as follows:

> 1. The district court was entirely correct in observing that we did not order a new trial.

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et al (C.A. No. 5133) will be included as part of the record in the above-captioned matter, subject to objections to the admissability [sic] of evidence already in the record.

[2]. Two members of the panel had sat on *Homefinders* and the writing judge was the same in both cases.

2. The court was essentially correct in considering plaintiffs "waived" any damage evidence that could reasonably have been discovered and was not offered. Basically plaintiffs must stand on the record.

3. Plaintiffs, however, could not be regarded as waiving evidence only thereafter available, and since the delay was occasioned by defendant, plaintiffs should be the ones to benefit, if there be such.

Nothing herein shall prevent the court from requiring any such new evidence to be presented by offer of proof, deposition, etc., as it may determine.

After our clarification issued, the district court requested and received an offer of proof from plaintiffs on after-acquired evidence. It rendered an opinion on October 27, 1983, holding that an injunction should issue and that there was insufficient evidence to support plaintiffs' damages claim. It also requested a fee application from plaintiffs within twenty days. On November 10, injunctive relief was ordered. The court, on the same day, awarded plaintiffs nominal treble damages in the amount of three dollars. Plaintiffs promptly appealed the damages award. Neither party has appealed the injunction.

Objections were made by defendant to plaintiffs' fee application and hearings were held on December 6 and 21, 1983. The court awarded plaintiffs $36,575 in attorney's fees by order dated December 22.

RECUSAL

On December 19, 1983, prior to the final hearing and award on attorney's fees, plaintiffs filed a motion for recusal of Judge Selya and for leave to conduct discovery in furtherance of the motion. An affidavit of one of the plaintiffs, Joseph P. Muschiano, accompanied the recusal motion. It averred that a complimentary article about Judge Selya was published in defendant's newspaper, *The Providence Journal,* on November 13, 1983. The affidavit quoted from the article

that Judge Selya "was active in Republican politics, serving several times as John Chaffee's [sic] campaign manager." John Chaffee is, and has been for a number of years, a United States Senator from Rhode Island. A copy of the newspaper article was appended to the affidavit. The core of the affidavit stated:

> The attached article was apparently researched and written while plaintiffs' case was still *sub judice* before the Court on the questions of injunctive relief and damages. Additionally, the Court still has before it the question of attorney's fees and costs.
>
> As revealed by the article, his Honor was formerly campaign manger for Senator John H. Chaffee. Upon information and belief John H. Chaffee:
>
> (a) Was responsible for the appointment of his Honor to the bench.
>
> (b) Was a former partner in the law firm of Edwards & Angell, the firm representing the Defendant, Journal in this case.
>
> (c) Is a cousin of William Chaffee, a director and shareholder of the Defendant, Journal.
>
> The above facts, in combination, make it appear that the Defendant, Journal, was and is currying special favor from the Court by taking advantage of prior personal relationships with Senator Chaffee and by preparing and publishing an article that is most complimentary to his Honor while this matter was still sub judice before the Court. I personally question whether these facts and factors infected the Court's decision in this case and whether the Court has or can remain impartial herein.

At the December 21 hearing on attorney's fees, Judge Selya, after a discussion on the record, denied the recusal motion because "I believe that this record is totally devoid of any facts which would constitute any type of minimally arguable factual basis on which an objective and reasonable man could doubt on the basis of what has been proffered by these plaintiffs the impartiality or fairness of this Court."

Although the motion itself does not specify its statutory basis, a memorandum of the plaintiffs filed along with the motion refers to 28 U.S.C. § 455(a) which provides: "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

We have construed 28 U.S.C. § 455(a) as follows:

> In essence, section 455(a) allows a judge to disqualify himself if a reasonable man would have factual grounds to doubt the impartiality of the court. Such a standard allows recusal when objective appearances provide a factual basis to doubt impartiality, even though the judge himself may subjectively be confident of his ability to be evenhanded.

Blizard v. Frechette, 601 F.2d 1217, 1220 (1st Cir. 1979). *See also, United States v. Kelley,* 721 F.2d 884, 890 (1st Cir. 1983); *In re United States,* 666 F.2d 690, 695 (1st Cir. 1981); *Brody v. President & Fellows of Harvard College,* 664 F.2d 10, 11 (1st Cir. 1981), *cert. denied,* 455 U.S. 1027 (1982); *United States v. Mirkin,* 649 F.2d 78, 81 (1st Cir. 1981); *United States v. Parilla Bonilla,* 626 F.2d 177, 179 (1st Cir. 1980); *United States v. Cowden,* 545 F.2d 257, 265 (1st Cir. 1976). Other circuits have also interpreted 28 U.S.C. § 455 (a) as establishing an objective-reasonable person standard. *See United States v. Nelson,* 718 F.2d 315, 321 (9th Cir. 1983); *United States v. Dalfonso,* 707 F.2d 757, 760 (3d Cir. 1983); *United States v. Norton,* 700 F.2d 1072, 1076 (6th Cir.), *cert. denied,* 103 S. Ct. 1885 (1983); *United States v. Miranne,* 688 F.2d 980, 985 (5th Cir. 1982), *cert. denied,* 103 S. Ct. 736 (1983); *United States v. Poludniak,* 657 F.2d 948, 954 (8th Cir. 1981), *cert. denied,* 455 U.S. 940 (1982); *Potashnick v. Port City Construction Co.,* 609 F.2d 1101, 1111 (3d Cir.), *cert. denied,* 449 U.S. 820 (1980).

We have further ruled that there must be some reasonable factual basis to doubt the impartiality of the judge and that

our review is limited to determining whether the trial judge abused his discretion in evaluating the recusal evidence. *United States v. Parilla Bonilla,* 626 F.2d at 179; *Blizard v. Frechette,* 601 F.2d at 1221.

We now turn to what triggered the recusal motion, the newspaper article.[3] The article which covered an entire page focused on the Judge's home which had been built by a Philadelphia architect in 1929 and acquired by Judge Selya and his wife in 1977. The article quoted an architectural historian from Brown University as saying that the house was "a bit of old Philadelphia on the East Side of Providence, pretty, elegant even witty...." In addition to a detailed description of the house, the article also contained a capsulized summary of the career highlights of the Judge's wife. The article noted briefly that the Judge had enjoyed a successful law practice, and was active in Republican politics, serving several times as Senator Chafee's campaign manager, before being appointed to the federal bench. Five photos accompanied the article, one of which showed the judge and his wife seated in the living room. Although the house is the focus of the article, the article is also a tribute to the discernment and good taste of the Judge and his wife in acquiring and tastefully refurbishing an architectural gem. It is clear that the article was written after a visit by a reporter and photographer to the Judge's home.

At the hearing on the recusal motion, Judge Selya stated that he felt proud and privileged to have a close personal relationship with Senator Chafee for twenty-years, which was a matter of common and public knowledge. He pointed out that the Senator had been a partner in the law firm representing the defendant between 1973 and 1975, but there was no suggestion or intimation in the motion that the Senator had any

[3] In the affidavit the affiant stated that he had urged his counsel to seek recusal of Judge Selya prior to publication of the article based solely on the Journal's and the Judge's relationship with Senator Chafee, but that his counsel had dissuaded him from so doing.

continuing interest or participation in the firm. Judge Selya emphasized that the case was brought after Senator Chafee's election to the United States Senate and subsequent to the severance of his relationship with the law firm representing the defendant.

Judge Selya then stated that he had never met William Chafee, alleged in the affidavit to be a cousin of Senator Chafee and a director and shareholder of the defendant's newspaper, and had no knowledge of Mr. Chafee's responsibilities and ownership interest in the Providence Journal.

The third matter discussed was the newspaper article. Judge Selya stated that two or three years prior to this, when he was a practicing attorney, he had received a request by the Providence Journal to go through his house and write a story about it. The request was rejected because he felt it would intrude on his privacy. The request was renewed after the Judge went on the bench and was granted because "I felt that I had given up a large measure of my privacy, that I was not in a position to deny it." Judge Selya then went on to state that the interview in his home, which took place on November 5, was conducted by a reporter, Donald D. Breed, who was an old friend from college days. There is nothing in the record indicating when the newspaper contacted the judge to make arrangements for the interview.

We have no hesitancy in ruling that Judge Selya's relationship with Senator Chafee, the Senator's past connection with the defendant's law firm, and the fact that a cousin of the Senator may be a stockholder and director of the defendant's newspaper are not grounds for recusal under section 455(a). It is common knowledge, or at least public knowledge, that the first step to the federal bench for most judges is either a history of active partisan politics or strong political connections or, as in the case of Judge Selya, both. "All judges come to the bench with a background of experiences, associations and viewpoints. This background alone is seldom sufficient in itself to provide a reasonable basis for recusal." *Brody v.*

President & Fellows of Harvard College, 664 F.2d at 11. The tenuous link between Senator Chafee and the defendant through his cousin, totally unknown to Judge Selya, would not raise even an eyebrow of the reasonable person objectively assessing the Judge's impartiality. Nor does the Senator's past connection with defendant's law firm cast the slightest doubt on Judge Selya's ability to act fairly in the case.

The newspaper article, however, is different and its impact must be assessed separately from the Judge's relationship with Senator Chafee, although both are lumped together in the recusal motion. Our analysis must be made within the framework of its appearance to the reasonable person. As the Third Circuit put it:

> Because 28 U.S.C. § 455(a) focuses on the appearance of impartiality, as opposed to the existence in fact of any bias or prejudice, a judge faced with a potential ground for disqualification ought to consider how his participation in a given case looks to the average person on the street. Use of the word "might" in the statute was intended to indicate that disqualification should follow if the reasonable man, were he to know all the circumstances, would harbor doubts about the judge's impartiality.

Potashnick v. Port City Const. Co., 609 F.2d at 1111 (citation omitted).

It is clear from reading the article that a reporter and photographer from the defendant's newspaper visited the Judge's home, and there is no question that the home interview took place during the period when the Judge was in the decision-making process of a case in which the newspaper that published the article was the defendant. It is not the complimentary tone of the article that gives pause for concern so much as its setting and timing. Although we are sure Judge Selya did not realize it, he had, in effect, invited one of the parties in a case to his home during the trial of that case. This would, we think, be bound to raise a serious doubt of the

court's impartiality in the mind of a reasonable person. This is not the case of an unsolicited complimentary newspaper article over which the judge has no control as in *Shultz v. Newsweek, Inc.*, 668 F.2d 911 (6th Cir. 1982). In *Schultz*, a newspaper had publicly supported the appointment of a district court judge to the circuit court. In upholding the refusal of the judge to recuse herself in a libel case against the newspaper, the court noted that "[o]ne of the functions of a newspaper is to comment on matters such as appointments to public office." *Id.* at 919. We think there is a great difference between unsolicited newspapers' comments attacking or praising a judge and an article based on an interview at a judge's home with an employee of one of the parties to a case that the judge then has under consideration. That the reporter who conducted the interview was an old friend of the Judge only adds to the appearance of partiality. No reason was given, nor is there any apparent, why the interview and article could not have been postponed until after the case had run its course.

The only case we have found on point is *Spires v. Hearst Corp.*, 420 F. Supp. 304 (C.D. Calif. 1976). In *Spires*, one of the defendant's newspapers ran a complimentary article about the district judge focusing on his skiing ability and his nomination to the United States Ski Hall of Fame by a reporter for the defendant. In his opinion, Judge Hauk stated that he did not have any personal bias on prejudice for or against any of the parties in the case. The judge felt, however, that his impartiality might reasonably be questioned and disqualified himself under 28 U.S.C. § 144,[4] 28 U.S.C.

[4] 28 U.S.C. § 144 provides:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

§ 455(a) and Canon 3C of the Code of Judicial Conduct.[5]

We have no doubt that Judge Selya decided the issues on this case impartially, but in light of the facts that the newspaper was a party to the case, that the judge was fully aware of this at the time the reporter was invited to his home, and that at the time of the interview the judge was in the process of deciding important issues in the case we are compelled to find that factual grounds existed for a reasonable person to doubt his impartiality. We think that in evaluating the impact of the newspaper article Judge Selya allowed the speciousness of the charges relative to his relationship with Senator Chafee to cloud an objective assessment of the import of the article in defendant's newspaper. We find that recusal was required under 28 U.S.C. § 455(a). This requires a remand for a determination by another judge of the amount of attorney's fees.

The determination of the amount of attorney's fees, however, involves a question of law that we think appropriate to decide at this time. Plaintiff contends that there should be included in the attorney's fees to which it is entitled a sum for the work done by its attorney in developing the liability record in the *Homefinders* case. Home Placement argues that because the policy and purpose of the antitrust attorney statute is to make the plaintiff completely whole and impose a penalty against the offender, it should recover attorney's fees for all the work that went into proving that defendant violated the antitrust laws.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

5. 28 U.S.C. § 455(a) has in all material respects been enacted as Canon 3C of the Code of Judicial Conduct.

We reject emphatically this add-on-fee request for two reasons. First, we point out that contrary to plaintiff's assertion in its brief, *Homefinders* was *not* a *companion case* to this one. It was a prior case that defendant won. It is obvious that the main reasons for the stipulated record were to save time for the court and expense for the parties. We are sure that defendant would not have agreed to make plaintiff's presentation of its proof easier in this case if it had known that it might have to pay the fees for the losing attorney in the prior case.

Our second reason for rejecting plaintiff's attempt to enhance its recovery is more basic. Time, skill, and experience are the lawyer's stock-in-trade. As an attorney gains in experience and skill, with experience honing skill, his or her services become more valuable and the hourly rate increases. Thus, the experience and skill acquired in trying cases in prior years adds to a lawyer's fee for cases tried in later years. That, however, is entirely different from adding directly on to the fees in one case a charge for time spent in a prior case. We rule that in computing attorney's fees in this case no charge can be made for developing the record in *Homefinders*.

DAMAGES

Appellants raise three issues on the question of damages: (1) whether they were entitled as a matter of law to a new trial on damages after remand; (2) did defendant waive its right to contest the legal sufficiency of plaintiff's "yardstick" evidence; and (3) was plaintiff's "yardstick" evidence inadequate as a matter of law for lack of sufficient comparability.

Remand-New Trial

Plaintiffs ask us to reconsider our clarification order which stated in essence that we did not order a new trial on dam-

ages, that plaintiffs "waived" any damage evidence that was not part of the stipulated record, and that plaintiffs had not waived any evidence that only became available after the record stipulation. This order became the law of the case. We are not any more impressed now than we were at the time of the clarification order with the argument that a combination of factors required a new trial on damages as a matter of law, even though we had not ordered one. Nor does the new contention of plaintiffs, that Federal Rule of Civil Procedure 63 requires a new trial, impress us. The rule simply does not apply to this situation.[6] Plaintiffs voluntarily entered into a stipulation as to what would constitute the evidence in this case for purposes of determining damages. We must assume not only that they knew what they were doing, but that they had a reason for doing it. Stipulations entered into between experienced and able counsel, such as we have here, are not to be shrugged off lightly. Moreover, even if the rule could nullify the stipulation, which we think it could not, a new trial is not mandatory under the rule; it is left up to the discretion of the successor judge. We rule, as a matter of law, that under the unique circumstances of this case, there would be no abuse of discretion in not granting a new trial on damages.

Waiver By Defendant

Plaintiffs argue that defendant waived its right to contest the legal adequacy[7] of plaintiffs' yardstick evidence. As we

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[6]. Fed. R. Civ. P. 63 provides:

> If by reason of death, sickness, or other disability, a judge before whom an action has been tried is unable to perform the duties to be performed by the court under these rules after a verdict is returned or findings of fact and conclusions of law are filed, then any other judge regularly sitting in or assigned to the court in which the action was tried may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial.

[7]. In their brief, plaintiffs use the words "adequacy" and "sufficiency" interchangeably. We consider them to be synon-

understand it, their argument runs as follows. The stipulated record from the *Homefinders* case contained evidence that compared a rental referral firm operating in Nashville, Tennessee, to such a firm operating in the State of Rhode Island. Although it had objected to the admission of such evidence on the stipulated record, the defendant did not question the legal sufficiency of the comparability data evidence until after our remand. This was too late. Defendant had waived its right to contest the legal sufficiency of this evidence and the district court was compelled to consider it in determining damages.

We do not agree. We turn to the stipulated record. When the comparability evidence was first offered, defense counsel stated:

> MR. EDWARDS: I do not think that the numbers in those exhibits establish the basis for the comparison. Even if the comparison as counsel represents in Nashville was somewhat similar to Providence, I don't think that's relevant on the issue of damages. I think Providence is relevant on the issue of Providence; that the fact further statistics assert numbers from federal publications show comprability [sic] on the numbers doesn't take into account all sorts of other factors that enter into the market. Nashville just isn't Providence.

This was clearly a challenge to the legal sufficiency of the evidence, even though the words "adequate" or "sufficient" were not used, as well as an objection on the grounds of relevancy. Defense counsel continued to object to the comparison evidence as the testimony of the expert witness proceeded. At the conclusion of the expert's testimony, plaintiffs' counsel moved for the introduction of the documents containing the comparison data. Defense counsel objected as follows: "We now renew our objection on the grounds that Nashville as the basis for comparison has not been ap-

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ymous in the context of this case, but prefer the word "sufficiency."

propriately established." This can only mean that the legal sufficiency of the evidence was being questioned. Even if defendant's objections are rigidly construed to have been based solely on relevancy, the line between legal sufficiency and relevancy is indistinguishable in the context of this case. We find on the basis of the stipulated record that defendant did not waive its right to question the legal sufficiency of the comparability evidence on remand.

There are other factors that militate against plaintiffs' attempt to have us rule that defendant conceded the entire issue of damages. Plaintiffs, either artfully or mistakenly, confuse the admissibility of evidence with its legal sufficiency. Evidence may be admissible, but may later be found in the context of the entire case to be legally insufficient. In the prior case (*Homefinders*) the question of damages was never reached. Defendant, therefore, never had reason to challenge its legal sufficiency in the framework of the case as a whole. This is quite different from objecting to its admissibility on the grounds of legal insufficiency. It is not unusual for a court to admit evidence and then at the conclusion of the evidence rule that it is legally insufficient. We do not think that defendant can be foreclosed from challenging the legal sufficiency of the yardstick evidence because its objection to its admission may have been semantically defective and, since there was no need to, did not question its legal sufficiency after its admission.

The third issue, whether such evidence was sufficient as a matter of law, should, we think, be decided by the district court in the first instance. Damages, particularly in an antitrust case, is a mixed question of fact and law. The considered judgment of a trial judge in analyzing the evidence is always helpful to an appellate court. Since there has to be a remand, we think it preferable for the district court to first decide the legal sufficiency question and then, if necessary, determine the amount of damages, if any. Such determina

tion will be made solely on the basis of the *Homefinders* record, and defendant shall have the right to contest the legal sufficiency of the yardstick evidence.

Affirmed in part, reversed in part. Remanded for further proceedings consistent herewith.

United States Court of Appeals
For the First Circuit

No. 83-1923.

HOME PLACEMENT SERVICE, INC., ET AL.,
Plaintiffs, Appellants,

v.

PROVIDENCE JOURNAL COMPANY,
Defendant, Appellee.

No. 84-1096.

HOME PLACEMENT SERVICE, INC., ET AL.,
Plaintiffs, Appellees,

v.

PROVIDENCE JOURNAL COMPANY,
Defendant, Appellant.

JUDGMENT

Entered: July 11, 1984

These causes came on to be heard on appeals from the United States District Court for the District of Rhode Island, and were argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed in part, reversed in part, and these causes are remanded to the district court for further proceedings consistent with the opinion filed this day.

No costs.

By the Court:
Francis P. Scigliano
Clerk.

United States Court of Appeals
For the First Circuit

HOME PLACEMENT SERVICE, INC., ET AL.,
Plaintiffs, Appellants,

vs. No. 83-1923

PROVIDENCE JOURNAL COMPANY,
Defendant, Appellee

HOME PLACEMENT SERVICE, INC., ET AL.,
Plaintiffs, Appellees,

vs. No. 84-1096

PROVIDENCE JOURNAL COMPANY,
Defendant, Appellant

PETITION FOR REHEARING

Plaintiffs/Appellants, pursuant to Rule 40 F.R.A.P. petition the Court for rehearing. There are two purposes to this Petition. First, to request the Court to clarify its Opinion and to modify its remand Order; and second, to request the Court to reconsider its ruling and interpretation of Rule 63 F.R.C.P. — *a ruling and interpretation which is contrary to the unanimous view of the courts (both Federal and State) and treatise that have interpreted said Rule.*

POINT I — *A REQUEST TO CLARIFY THE COURT'S RULINGS*

A reading of the Opinion of the Court leaves the reader with the impression that something has been omitted. Although the Court's opinion may be interpreted to mean that a resolution of the recusal issue required a reversal and remand

as to both attorney's fees and damages the Opinion does not explicitly state this conclusion. *Compare, Slip Opinion at 13 and 18.* The Court may wish to clarify this matter.

Additionally the Remand Order contains the following language:

> "Since there has to be a remand, we think it preferable for the district court to first decide the legal sufficiency question and then, if necessary, determine the amount of damages, if any. Such determination will be made *solely* on the basis of the *Homefinders* record, and defendant shall have the right to contest the legal sufficiency of the yardstick evidence."
>
> *Slip Opinion at 18-19* (Emphasis added)

If taken literally this remand language is to be interpreted to exclude the testimony and evidence that was introduced at the Home Placement trial and the after acquired evidence permitted by this Court's Clarification Order. The Court could not have intended this result.

More importantly the above remand language leaves the District Court (a new trier) no discretion to grant a new trial — a discretionary power specifically reserved to a successor judge by Rule 63 F.R.C.P.[1] See, e.g., *Golf City, Inc. v. Wilson Sporting Goods Co., Inc.,* 555 F.2d 426, 438 n. 20 (5th Cir. 1977).[2]

POINT 2 — *A REQUEST TO RECONSIDER THE COURT'S RULE 63 RULING*

The Court's ruling that Rule 63 F.R.C.P. does not require a new trial on the damage issue is contrary to the unanimous

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[1] The court's statement that the stipulation of the parties cannot override the provisions of Rule 63, *Slip Opinion at 16* is, plaintiffs respectfully suggest, erroneous as will be explained in the argument made in support of the next point, infra.

[2] Another reason why the district judges discretion should not be restricted on remand is contained in footnote 4, infra.

holdings of the Courts that have interpreted said Rule. This Court's Opinion makes two points with respect to the Rule 63 argument. First that the Stipulation of the parties determined "what would constitute the evidence in this case for determining damages", *Slip Opinion at 16*, and that "(Rule 63) could (not) nullify the stipulation". *Id.* Secondly, the Court's Opinion states that under Rule 63 a new trial is discretionary not mandatory. *Id.* Plaintiff will address these points seriatim.

(A) *The Stipulation*

The stipulation of the parties does not and cannot have any effect or bearing on resolution of the Rule 63 issue. Simply stated the stipulation and the Rule speak to different issues. Rule 63 deals with the power, duties and obligations of a "successor judge" when the original judge *who heard the witnesses and ruled on the admission and exclusion of evidence has become disabled.* See, Rule 63 F.R.C.P. The stipulation of the parties in this case was entered into before the "original judge" (Judge Boyle) who heard the witnesses and ruled on the admission and exclusion of the evidence. *There was no stipulation entered into before the successor judge (Judge Selya) who did not hear the witnesses in this case.*

The rationale of the Court on the stipulation issue is contrary to the very purpose of Rule 63. The precise purpose of Rule 63 (when certain preconditions are met) is to "nullify" (by granting a new trial) previous evidentiary presentations, whether by stipulation or otherwise, when the original judge who heard the witnesses and ruled on the admission or exclusion of evidence becomes disabled.[3] It is wrong to suggest

[3] In effect any time a party presents his case he is "stipulating" for the purposes of that trial that this is the evidence he is relying on. The stipulation of the parties in this case can mean no more or less than that the parties agreed to the evidence to be relied upon by the judge *who had heard the witnesses and ruled on the admis-*

that a stipulation entered into before a judge who heard the witnesses can have any effect on the resolution of the question of the powers, duties and obligations of a successor judge under Rule 63 who has not heard the witnesses or ruled on the admission or exclusion of the evidence.[4]

(B) Rule 63 is mandatory not discretionary when the original Judge becomes disabled before findings of fact and conclusions of law have been filed on the issue in question

This Court ruled that Rule 63 is purely discretionary. *Slip Opinion at 16.* Every other Court that has interpreted Rule 63, however, has concluded that a new trial is *mandatory* if the original judge becomes disabled *before findings of fact and conclusions of law have been filed concerning the issue in question.* See, *Whalen v. Ford Credit Co.,* 684 F.2d 272 (4th Cir. 1982); (and cases cited), *cert. denied,* 103 S.Ct. 216.[5] *Thompson v. Sawyer,* 678 F.2d 257, 268-269 (D.C. Cir. 1982); *Arrow Hart, Inc. v. Covert Hills, Inc.,* 552 F.2d 711 (6th Cir. 1977); *Federal Deposit Inc. Corp. v. Sirocco,* 174 F.2d 360 (2nd Cir. 1949); *Sea-Gate, Inc. v. United States,* 35 Fed. Rules

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sion and exclusion of evidence. Hardly a trial goes by without the parties agreeing on some portion of the evidence. Does this preclude a new trial? Moreover, beyond the "stipulation" there was additional supplementary evidence taken before Judge Boyle.

[4] Indeed under the reasoning of a previous holding of this Court plaintiffs have a valid argument that they should be relieved of their jury trial waiver on remand. See, *Hanlon v. Providence College,* 615 F.2d 535, note 7 (1st Cir. 1980). This argument should have particular force where plaintiffs on remand are facing a different judge than the one before whom the jury waiver was consented to.

[5] The Whalen case is an *en banc* decision of the Fourth Circuit (10 judges sitting) and gives an exhaustive analysis of the Rule 63 issue. The *en banc* Court split 7-4 ruling that a new trial was mandatory and the Supreme Court denied *certiorari* 103 S.Ct. 216. The dissenters, however, only disagreed as to whether a new trial was warranted in a jury trial situation as opposed to a non-jury trial.

Serv. 2d 1392 (Ct. Cl. 1983).[6] It is also the unanimous view of the treatise that a new trial is mandatory in these circumstances under Rule 63. See, 7 *J. Moore's Federal Practice,* Para. 63.05 at p. 63-91, 11 *Wright & Miller, Federal Practice and Procedure,* Sec. 2922 at p. 340.

In this case the original judge who heard the witness became "disabled" by the previous ruling of this Court. See, *Home Placement Service, Inc. v. Providence Journal Co.,* 682 F. 2d 274, 281 (1st Cir. 1982).[7] Moreover, Judge Boyle had not reached or decided the damage issue. Thus the original judge, now disabled, had made no findings of fact or conclusions of law on this issue. Consequently, a new trial on the damage issue should be mandatory under the unanimous view of the Courts and treatise that have interpreted Rule 63.

The Petition for Rehearing should be granted.

HOME PLACEMENT SERVICE, INC., ET AL.
By its Attorney,

RALPH J. GONNELLA
300 East Greenwich Avenue
West Warwick, RI 02893

CERTIFICATION

I hereby certify that a copy of the within was mailed, postage prepaid, to Joseph V. Cavanagh, Jr., 2700 Hospital Trust Towers, Providence, RI this 24th day of July, A.D. 1984.

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[6] State courts that have interpreted Rule 63 have uniformly agreed that a new trial is mandatory when a successor judge is substituted before findings of fact and conclusions of law have been filed by the judge who heard the evidence. See, e.g., *Pallestine v. Severance,* 375 F.2d 528, 529-530 (Alaska 1966); *Sunshine v. Sunshine,* 30 Colo. App. 67, 72, 488 F.2d 1131, 1134 (1971); *Girard* Trust Bank v. Easton, 12 N.C. App. 153, 155, 182 S.E. 2d 645, 646 (1971); *State ex rel Lunsford v. Weber,* 152 W. Va. 544, 547-548, 170 S.E. 2d 671, 673 (1969).

[7] The term "disability" means more than physical disability and includes anything which prevents the original trier from rehearing the matter. See, *Sea-Gate, Inc. v. United States,* supra; *7 Moore's Federal Practice,* Para. 63.05; Wright & Miller *Federal Practice & Procedure,* Sec. 2922.

United States Court of Appeals
For the First Circuit

No. 83-1923.

HOME PLACEMENT SERVICE, INC., ET AL.,
Plaintiffs, Appellants,

v.

PROVIDENCE JOURNAL COMPANY,
Defendant, Appellee.

No. 84-1096.

HOME PLACEMENT SERVICE, INC., ET AL.,
Plaintiffs, Appellees,

v.

PROVIDENCE JOURNAL COMPANY,
Defendant, Appellant,

Before
COFFIN, BOWNES AND BREYER,
Circuit Judges

ORDER OF COURT

Entered August 28, 1984

Plaintiffs-appellants' petition for rehearing is denied.

We do not understand appellants' statement that our resolution of the recusal issue did not explicitly state that a

reversal and remand as to both attorney's fees and damages were required. On page 13 of the slip opinion, we stated: "We find that recusal was required under 28 U.S.C., Sec. 455(a). This requires a remand for a determination by another judge of the amount of attorney's fees." We then went on to rule as a matter of law that the add-on-fee request of the plaintiff was rejected. On page 18 of the slip opinion, we stated: "Since there has to be a remand, we think it preferable for the district court to first decide the legal sufficiency question and then, if necessary, determine the amount of damages."

In its petition, appellants further state that, if taken literally, the remand language can be interpreted "to exclude the testimony and evidence that was introduced at the Home Placement trial and the after-acquired evidence permitted by this court's clarification order." Our reading of the record and Judge Selya's opinion is to the effect that the district court requested and received an offer of proof from plaintiffs on after-acquired evidence. See page 4 of slip opinion. There is nothing in the record to indicate that testimony and evidence was actually introduced at the Home Placement trial. In order to clarify any misunderstanding, the final sentence of the opinion shall be rewritten as follows: "Such determination will be made solely on the basis of the Homefinders record and any after-acquired evidence that the court shall deem admissible, and defendants shall have the right to contest the legal sufficiency of the yardstick evidence."

We reaffirm our ruling that Federal Rule of Civil Procedure 63 does not apply.

By the Court:

Francis P. Scigliano

Clerk.

[cc: Messrs. Gonnella and Cavanagh.]

Office - Supreme Court, U.S.
FILED
DEC 10 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-844

In the Supreme Court of the United States

OCTOBER TERM, 1984

HOME PLACEMENT SERVICE, INC.,
PETITIONER,

v.

PROVIDENCE JOURNAL COMPANY,
RESPONDENT.

Supplemental Appendix to Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

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ADDISON C. GETCHELL & SON, INC. - THE LAWYERS' PRINTER - BOSTON

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UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF RHODE ISLAND

HOME PLACEMENT SERVICE, INC.
and JOSEPH P. MUSCHIANO,
Plaintiffs

v. C. A. No. 77-158/S

PROVIDENCE JOURNAL COMPANY,
Defendant

ORDER

This matter came on for hearing on Defendant's Motion for Entry of Judgment, the parties having submitted memoranda of law and presented oral argument on May 9 and May 11, 1983, and the Court having been fully advised in the premises, and upon consideration thereof,

It is hereby **ORDERED,** as follows:

1. There shall be no new trial on the issue of damages. The Court will pass upon the damage issue on the record as constituted during the original trial. The reference in footnote 8 of the Opinion of the Circuit Court of Appeals to the question of "waiver" was a shorthand reference to a putative failure of proof.

2. The parties may submit briefs as to whether or not the evidence in the record supports a claim for damages and, if so, the amount of damages that should be found; the question of "waiver" (sufficiency of the damage evidence) shall be determined by the Court. The parties shall submit proposed findings of fact and conclusions of law on the issue of damages on or before June 24, 1983.

3. The parties may undertake, on or before June 9, 1983, such discovery by way of depositions, demands for produc-

tion or interrogatories as they desire, addressed strictly and solely to issues germane as to whether or not injunctive relief should issue; and they shall submit briefs as to the questions appertaining to injunctive relief on or before June 24, 1983; *provided, however,* that such discovery shall be, and is hereby, stayed until after disposition by the Court of Appeals for the First Circuit of plaintiff's proposed petition for clarification of its mandate *and* until further order of this Court.

4. The parties may request a further evidentiary hearing on the question of injunctive relief, setting forth not only the request for the further evidentiary hearing, but the reasons in support of it, having in mind that the Court prefers evidence adduced by discovery, rather than an actual evidentiary hearing.

5. The issue of counsel fees is deferred.

6. Defendant's motion for entry of judgment as framed is denied without prejudice but is treated as a motion for a determination of the issues raised.

ENTERED as the Order of Court this 12th day of May, 1983.

_____
Clerk of Court

ENTER:

Attest to
True Copy
FREDERICK R. DeCESARIS
Clerk/Magistrate

_____
United States District Judge

By _____
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 81-1783

HOME PLACEMENT SERVICE, INC. et al.,
Plaintiffs, Appellants,

v,

THE PROVIDENCE JOURNAL COMPANY,
Defendant, Appellee.

Before
Aldrich, Coffin and Bownes,
Circuit Judges.

MEMORANDUM AND ORDER
Entered: June 16, 1983

Per Curiam. The court grants plaintiffs' motion for clarification. In response, not to plaintiffs' question as phrased on page 9 thereof, but, more generally, to what the court meant,

1. The district court was entirely correct in observing that we did not order a new trial.

2. The court was essentially correct in considering plaintiffs "waived" any damage evidence that could reasonably have been discovered and was not offered. Basically plaintiffs must stand on the record.

3. Plaintiffs, however, could not be regarded as waiving evidence only thereafter available, and, since the delay was occasioned by defendant, plaintiffs should be the ones to benefit, if there be such.

Nothing herein shall prevent the court from requiring any such new evidence to be presented by offer of proof, deposition, etc., as it may determine.

By the Court,

Clerk.

Office - Supreme Court, U
FILED
DEC 24 1984
ALEXANDER L. STEVA
CLERK

No. 84-844.

In the Supreme Court of the United States.

OCTOBER TERM, 1984.

HOME PLACEMENT SERVICE, INC.,
PETITIONER,

v.

PROVIDENCE JOURNAL COMPANY,
RESPONDENT.

Brief in Opposition to a Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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Questions Presented.

Respondent Providence Journal Company[1] respectfully urges that the questions presented are more properly framed as follows:

1. Does Rule 63 of the Federal Rules of Civil Procedure require a new trial on damages where the parties stipulated at trial the evidence for determining damages?

2. Should this Court grant certiorari to review an interlocutory order?

---

[1] In compliance with Rule 28.1 of the Supreme Court Rules, respondent states that its non-wholly owned subsidiaries, and its affiliates, are: Mobile-Pensacola Broadcasters, Inc., Bristol County Cellular Radio, Inc., Carolinas RCC, Inc., Aircall, Inc., CARS of Burlington, Inc., CARS of the Carolinas, Inc., CARS of Hickory, Inc., CARS of Salisbury-Concord, Inc., CARS of the Skyland, Inc., CARS of the Triad, Inc., CARS of the Triangle, Inc., Dial Page of the Triad, Inc., PACE, Inc., Two Way Radio of Carolina, Inc., Radio Paging Services, Camden Mobile Communications, Inc., CARS of Anderson, Inc., CARS of Columbia, Inc., CARS of Piedmont, Inc., CARS of York, Inc., Evans Communications, Inc., Evans Telephone Answering Service, Rock Hill Mobile Communications, CARS of Savannah, Inc., Georgia Paging Company, Dial Page of Tri-Cities, Inc., Rhode Island Cellular Radio, Inc., Colony Microband of Massachusetts, Inc., Colony Microband of Rhode Island, Inc., Dynamic Cablevision of Florida, Inc., Greater Fall River Cable TV, Inc., Vision-Cable Company of Rhode Island, Inc., Copley/Colony, Inc., Copley/Colony Cablevision of Costa Mesa, Inc., Copley/Colony Cablevision of Cypress, Inc., Copley/Colony Cablevision of Lomita, Inc., Copley/Colony Cablevision of Los Angeles County, Inc., Copley/Colony Cablevision of Orange County, Inc., Copley/Colony Harbor Cablevision, Inc., Compucolor International, Mountain State Broadcasting, PH Associates, Venice Properties, Ltd.

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Argument

I. Rule 63 of the Federal Rules of Civil Procedure does not apply, and should not be applied, in this case to compel a plenary evidentiary trial on the damages issue, after remand. 4

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No. 84-844.

In the Supreme Court of the United States.

OCTOBER TERM, 1984.

HOME PLACEMENT SERVICE, INC.,
PETITIONER,

v.

PROVIDENCE JOURNAL COMPANY,
RESPONDENT.

Brief in Opposition to a Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Statement of the Case.

This case, brought under Sections 1 and 2 of the Sherman Act, by petitioner Home Placement Service, Inc. and others,[2] is a sequel to an earlier case involving similar issues, *Homefinders of America, Inc. v. Providence Journal Co.*, 621 F.2d 441 (1st Cir. 1980). In *Homefinders*, the Court of Appeals affirmed the District Court's dismissal of the action,[3] holding that defendant incurred no Sherman Act liability for refusing advertising proffered by Homefinders' franchisee for so-called rental referrals, where the ads were deceptive.

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[2] Plaintiff Joseph P. Muschiano is not a party to this petition.
[3] 471 F.Supp. 416 (D.R.I. 1979).

In this action, the parties stipulated[4] that the record in the prior *Homefinders* case would be made a part of the record. After hearing additional testimony, the District Court (Boyle, J. who had also heard the *Homefinders* case) in an unreported decision dismissed the action, holding that the respective Homefinders and Home Placement "schemes . . . [were] . . . not distinguishable." On appeal, the First Circuit reversed, holding that Home Placement's advertisements were not deceptive and that plaintiffs had established violations of Sections 1 and 2 of the Sherman Act. The matter was remanded "to determine the appropriate form of injunctive relief, if any is needed, and the amount owing in damages and attorney's fees." *Home Placement Service, Inc. v. Providence Journal Co.*, 682 F.2d 274, 281 (1st Cir. 1982), *cert. denied*, 103 S. Ct. 1279 (1983).

In remanding, the Court of Appeals suggested that the case be referred to another district judge. Id. at 281. District Judge Selya, to whom the case was assigned, ruled[5] that there would be no new trial on the question of damages and that he would determine damages on the stipulated record as supplemented.

Plaintiffs sought clarification by the Court of Appeals on motion. The Court of Appeals responded[6] that: ". . . (1) The district court was entirely correct in observing that we did not order a new trial, (2) . . . was essentially correct in considering plaintiffs 'waived' any damage evidence that could not reasonably have been discovered and was not offered . . .," but permitted plaintiff to proffer any evidence acquired after the December, 1980 trial. Following plaintiffs' offer of proof on after-acquired evidence, Judge Selya ruled that an injunction should issue, held that there was insufficient evidence to

[4] The text of the stipulation is set forth in n.1 on pp. 2-3 of the appendix to the petition herein, hereinafter "App.".

[5] Supplemental Appendix, 1-2.

[6] Supplemental Appendix, 3-4.

support plaintiffs' damage claim, and awarded plaintiffs nominal damages of $1.00, trebled.[7] Attorneys' fees were awarded to plaintiffs' counsel and a motion to recuse Judge Selya was heard and denied.

Plaintiffs appealed the damage decision and the denial of the motion to recuse. Both parties appealed the attorneys' fee award. Neither party appealed the injunction.

On this appeal, plaintiffs for the first time argued that Rule 63 of the Federal Rules of Civil Procedure mandated a full new trial on the issue of damages after remand. The Court of Appeals reaffirmed for the second time that it was proper for the district court to rule on the damage issue on the stipulated record (as supplemented by after-acquired evidence), but reversed on the recusal issue. *Home Placement Service, Inc. v. Providence Journal Co.*, 739 F.2d 671 (1st Cir. 1984); App. 1-16. The case was thereupon remanded for a determination by another district judge of both the attorneys' fees issue and the damages issue. Thereafter, plaintiffs filed a motion with the Court of Appeals for rehearing, which was denied (A. 23-24).

The First Circuit said: "We reaffirm our ruling that Rule 63 does not apply" (A. 24).

Reasons for Denying the Petition.

Summary of Argument.

I. Rule 63 of the Federal Rules of Civil Procedure does not apply to the procedural facts of this case to compel a full new trial on the issue of damages and the First Circuit was correct in so holding. The First Circuit decision on this issue is not in conflict with the decisions of other circuit applying Rule 63 in post-trial situations in the trial courts.

II. The petition for certiorari herein seeks review of an interlocutory order remanding the case to the District Court.

[7] *Home Placement Service, Inc. v. Providence Journal Co.*, 573 F.Supp. 1423 (D.R.I. 1983).

There being no compelling necessity for plenary review by this Court at this time, the petition should be denied.

Argument.

I. Rule 63 of the Federal Rules of Civil Procedure Does Not Apply, and Should Not be Applied, in this Case to Compel a Plenary Evidentiary Trial on the Damages Issue, After Remand.

Petitioner's belated assertion of Rule 63[8] is an attempt to secure a second bite at the apple, a plenary new trial on damages, and is wholly without foundation. The Court of Appeals for the First Circuit held, after its 1982 remand,[9] on petitioner's motion for clarification, that they had not ordered a new trial and that: "The [District] Court was essentially correct in considering plaintiffs 'waived' any damage evidence that could reasonably have been discovered and was not offered. Basically, *plaintiffs must stand on the record*...." [Emphasis added.] *Home Placement*, 739 F.2d at 673 (App. 4, Supp. App. 3).

Following a decision unfavorable to petitioners on the damage issue ($1.00 damages, trebled to $3.00), petitioners on appeal for the first time contended that Rule 63 compelled a full new trial.

The Court of Appeals was clearly correct in saying that:

> The rule [63] simply does not apply to this situation. [Footnote quoting Rule 63 omitted.] Plaintiffs voluntarily entered into a stipulation as to what would constitute the evidence in this case for purposes of determining damages.... We rule, as a matter of law, that under the unique circumstances of this case, there would be no abuse of discretion in not granting a new trial on damages....

Id. at 677-8. (App. 13).

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[8] *Home Placement*, 739 F.2d at 677; App. 13.

[9] *Home Placement*, 682 F.2d 274.

Thereafter, when petitioners requested reconsideration of this ruling, the First Circuit reaffirmed its ruling that Rule 63 did not apply (App. 24).

By its terms, Rule 63 is not applicable to the situation in this case. It is clearly designed to permit *nisi prius* judges to perform essentially ministerial acts after trial and after verdict where the trial judge has died, or becomes sick, or has been otherwise disabled. Petitioner here seeks to leverage the provisions of this rule into a basis for granting a motion to reopen its case.

Respondent has found no decisions applying Rule 63 to compel a full new trial after remand. None of the cases cited in the petition (Pet., 6-9) involved a remand with a direction for determination of particular issues by another judge. The cited decisions regarding Rule 63 all involved post-trial determinations in the trial courts. There is thus no "conflict in the circuits" as petitioner argues (Pet., 9).

Moreover, the parties here stipulated at trial that the Homefinders record be part of the record herein [*Home Placement*, 739 F.2d at 672, n. 1 (App. 2-3)]. After the stipulation, without proffering additional evidence on damages (comparability), petitioner rested its case (App. 3-4; Supp. App. 3). Petitioner's invocation of Rule 63, in the wrong context, is simply an attempt to reopen at a very late stage. The attempt should be disallowed.

The sole question remaining for the trial judge to whom the case is now remanded is the *sufficiency* of the damage evidence as a matter of law: "Since there has to be a remand, we think it preferable for the district court to first decide the legal sufficiency question and then, if necessary, determine the amount of damages, if any." *Home Placement*, 739 F.2d at 679 (App. 15).

Contrary to petitioner's argument at pages 8-9 of its petition, this issue does not involve the credibility of witnesses, but has solely to do with the sufficiency of the record evi-

dence.[10] The fact that there has been a second remand to a third trial judge by virtue of the First Circuit decision on recusal, does not change the result on petitioner's attempt to reopen. The third trial judge (to whom the case now stands remanded) is in the same position in determining the legal sufficiency of the record as the recused judge. Indeed, he is essentially in the same position as the first trial judge, had the case originally gone back to him for determination of damages. The stipulation limited plaintiff-petitioner's evidence on damages *to the existing record.* Clearly, the First Circuit was correct in so ruling (App. 13):

> . . . We must assume not only that they [plaintiffs] knew what they were doing, but that they had a reason for doing it. Stipulations entered into between experienced and able counsel, such as we have here, are not to be shrugged off lightly. Moreover, even if the rule could nullify the stipulation, which we think it could not, a new trial is not mandatory under the rule; it is left up to the discretion of the successor judge. We rule, as a matter of law, that under the unique circumstances of this case, there would be no abuse of discretion in not granting a new trial on damages. . . .

Home Placement, 739 F.2d at 678 (App. 13).

II. The Petition Should Be Denied because There Is No Compelling Necessity for Interlocutory Review.

The petition requests review of a ruling and mandate of the First Circuit remanding the instant action to the district court. Petitioner has failed to demonstrate any compelling

[10] The damage question involves plaintiff's attempt to use the "yardstick" approach in comparing plaintiff's business to an allegedly similar business. The record consists only of plaintiff's evidence; the defendants never proffered any countervailing evidence, arguing instead that plaintiff's evidence was purely speculative and inadequate. Thus, the damage issue is in a posture to be determined by a judge simply by reviewing the record and deciding whether the uncontradicted evidence is sufficient to meet the minimum standards of proof of damages in an antitrust case.

reason for review of this interlocutory order. As pointed out above at page 5, there is no "conflict" between this essentially procedural ruling and decisions in other circuits on Rule 63.

Absent finality and a compelling reason, this Court should deny certiorari. As long ago stated in *American Construction Co. v. Jacksonville T. & K. R. Co.*, 148 U.S. 372, 384 (1893): "this court should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *See also Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 584-585 (1952); *Cobbledick v. United States*, 309 U.S. 323, 324-325 (1939). *Cf. Beacon Theatres Inc. v. Westover*, 359 U.S. 500, 501 (1959).

Petitioner herein has demonstrated no exceptional reason to justify interlocutory review.

Conclusion.

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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